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IN THE

Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF ENVIRONMENTAL DEFENSE, NATURAL RESOURCES DEFENSE COUNCIL, NATIONAL WILDLIFE FEDERATION, CHESAPEAKE BAY FOUNDATION, WORLD WILDLIFE FUND, AND DEFENDERS OF WILDLIFE AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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This case presents the question whether Congress, under the Commerce Clause and the Clean Water Act, has power to regulate economic activities that pollute or destroy intrastate surface waters, where those waters are used as habitat by migratory birds. The answer to this question, entirely consistent with this Court's opinions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 120 S. Ct. 1740 (2000), is yes.

INTEREST OF AMICI CURIAE

Amici are national nonprofit organizations with strong interests in the protection of water resources and conservation of habitat and wildlife.[1] With a total of more than 2 4 million members collectively throughout the United States, amici strongly support Congress's power to enact legislation protecting the environment and the Clean Water Act's purpose of "restoring and maintaining the physical, chemical and biological integrity of our Nation's waters."

Petitioner, the Solid Waste Agency of Northern Cook County ("SWANCC"), argues that its proposed landfill and the resulting water pollution are not subject to federal regulation because the Clean Water Act protects only "navigable" waters of the United States and waters that are adjacent to such navigable waters. Alternatively, SWANCC argues that Congress does not have power under the Commerce Clause to regulate water pollution resulting from construction and operation of the proposed landfill.

If adopted, SWANCC's interpretation of the Clean Water Act would roll back the scope of federal water pollution control to the pre-Act 1960s, invalidating much of

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[1] Pursuant to this Court's Rule 37.6, amici state that this brief was not authored in whole or in part by counsel for any party and that no person or entity, other than amici and their counsel, made any monetary contribution to the preparation or submission of this brief. Written consent to the filing of this brief has been obtained from the parties. Copies of the consent letters have been filed with the Clerk.

the current federal regulation of water pollution, including point source industrial discharges, into lakes and ponds, wetlands, and intermittent streams. Millions of acres of "isolated" surface waters and wetlands throughout the Nation would be removed from federal protection under this interpretation.

SWANCC's constitutional theory would have even more far-reaching consequences, effectively overruling the rational basis test applied by this Court for more than sixty years in Commerce Clause cases involving regulation of economic activities, and subjecting jurisdictional nexus tests under the Clean Water Act and dozens of other federal regulatory programs to a new, strict scrutiny standard of review.

Amici file this brief pursuant to this Court's Rule 37, in the interest of clarifying the statutory and constitutional basis for the well-established, plenary authority of Congress and the Executive Branch to regulate economic activities that threaten our Nation's water resources and wildlife.

STATEMENT

SWANCC is a corporation formed by a consortium of 23 municipalities under Illinois state law. During the late 1980's, SWANCC proposed to construct and operate a landfill in Northern Cook County, Illinois. (A.R. 15573.)[2] As originally proposed, the landfill would cover approximately 410 acres, including 298 acres of forest, and would require the discharge of fill material — a pollutant under the Clean Water Act — into 31 acres of ponds and other on-site surface waters. (A.R. 15573-74.) The landfill would have total economic impacts of $69 million and would receive hundreds of thousands of tons of solid waste per year. (A.R. 15635, 15622.)

The landfill was proposed to be located at a site of significant ecological value. Undisturbed since the early

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[2] References to "A.R." are to the Administrative Record below.

1950's, the site includes a number of ponds, up to six feet deep, and teems with birds, fish and wildlife. (A.R. 15669.) The site is used as habitat by many species of water-dependent migratory birds, including a sizeable rookery of great blue herons, a colonial nesting bird that is among the largest water birds in North America. (A.R. 15578; 15697-700.)

In 1990, SWANCC requested a determination by Respondent, the U.S. Army Corps of Engineers ("Corps"), whether construction and operation of the landfill would require a permit under the Clean Water Act. After extensive administrative review, the Corps determined that because 31 acres of waters proposed to be polluted or destroyed by the landfill were used as habitat by scores of nesting great blue herons and approximately 120 other species of migratory birds, SWANCC was required to obtain a permit. (A.R. 780-81, 15578, 15582, 34636.)

SWANCC's permit application described several potential environmental hazards posed by the landfill, including discharges of leachate contaminated by hazardous organic chemicals. (A.R. 15666-67, 15717.) Following lengthy permit proceedings, the Corps determined that the proposed landfill posed significant environmental risks, including potential contamination of a major drinking water source for several local communities. (A.R. 15721.) The Corps found that pollution of waters at the site would harm many of the migratory birds that nested and foraged there. (A.R. 15692-710, 15654-55.) In addition, the Corps found that the proposed stormwater management plan for the landfill was insufficient, threatening contamination of nearby wetlands in the event of greater than average rainfall events. (A.R. 15645-47.) Because SWANCC did not propose effective mitigation measures to address these harms, the Corps denied the permit application. (A.R. 15658-59.) SWANCC did not challenge the Corps' findings below; it voluntarily dismissed all of its claims other than the constitutional and statutory arguments that are presented

here. *See SWANCC v. Corps*, 191 F.3d 845, 849 (7th Cir. 1999).

SUMMARY OF ARGUMENT

In 1972, Congress passed the Federal Water Pollution Control Act ("Clean Water Act" or "Act") "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Responding to the failure of state and local governments to avert what had become a national water pollution crisis, Congress created a comprehensive, federal water pollution control program establishing nationwide standards and federal permitting and enforcement procedures.

The Clean Water Act regulates activities that cause pollution of "navigable waters," defined in the Act as "waters of the United States." 33 U.S.C. § 1362(7). By 1977, the U.S. Environmental Protection Agency ("EPA") and the Corps, jointly charged by Congress with responsibility for administering the Act, had determined that the phrase "waters of the United States" was intended by Congress to extend to "all waters within the reach of the Commerce Clause power," and had promulgated regulations implementing that interpretation. The numerous federal courts that have ruled on the issue since 1972 have uniformly agreed with EPA and the Corps, holding that the phrase "waters of the United States" is to be "given the broadest possible constitutional interpretation." This conclusion is compelled by the text and structure of the Act, its purposes and goals, and legislative history. This Court has held that the Corps' determinations regarding the scope of its jurisdiction under the Act are to be given deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). The Corps' interpretation here clearly "is reasonable, in light of the language, policies, and legislative history of the Act." *Id.* at 133.

SWANCC argues that the Act must include a "navigability" requirement because of the use of the term

"navigable waters," even though that term is defined to include all "waters of the United States." But the statute's history refutes this argument. "Navigable waters" operates as a definitional term that was held over from prior federal water pollution legislation dating back to the Rivers and Harbors Act of 1899. In 1972, Congress chose to redefine that term, rather than replace it, but did so in enacting a comprehensive long-range policy for the elimination of water pollution that does not make any reference to "navigation" or "navigability" elsewhere in the text of the statute. Moreover, Congress ratified the settled interpretation of this term as meaning all waters of the United States within the Commerce Clause power when it substantially amended the Clean Water Act in 1977 and 1987, well after that interpretation had been established by the Executive Branch agencies and uniformly upheld in the federal courts. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975). Thus, the principal issue in this case is whether Congress has power under the Commerce Clause to regulate SWANCC's landfill pollution.

Article I, § 8 of the Constitution grants the federal government power to "regulate Commerce . . . among the several States." This includes commerce that "concerns more States than one," or "affects other States," even if the regulated activity occurs within a single state. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824).

Water pollution is a quintessential example of a national problem, having substantial cumulative impacts on interstate commerce, that requires a uniform, nationwide solution. Federal regulation of intrastate activities that cause environmental degradation has long been held to be within the Commerce Clause power. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 277 (1981).

This Court consistently has held that where Congress is regulating economic activity, deference must be accorded to the judgments of the Legislative and Executive branches regarding effects on interstate commerce. *See Gibbons*, 22 U.S. (9 Wheat.) at 197. If there is a rational basis for finding

that the regulated economic activity, in the aggregate, may have interstate effects, and where the regulations are reasonably tailored to address the underlying problem, the courts will not substitute their judgments for those of the political branches of government. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964). "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *United States v. Morrison*, 120 S. Ct. 1740, 1749 (2000).

The Clean Water Act regulates economic activity. The activities regulated under the Act that result in discharges of pollutants to surface waters — land development, manufacturing, agriculture, mining, construction, and waste disposal, for example — are overwhelmingly and obviously commercial in nature. This case in particular involves federal regulation of economic activity. SWANCC proposed to build and operate a $69 million landfill that would receive hundreds of thousands of tons of solid waste, generate millions of dollars of revenues annually, and employ 81 full-time workers. The business of solid waste disposal is "commerce." *See City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

Since they have power to regulate intrastate economic activity only where it has a sufficient nexus with interstate commerce to confer federal jurisdiction, EPA and the Corps have developed a number of tests to determine such a nexus on a case-by-case basis. In this case, federal jurisdiction was based on the undisputed fact that ponds and other surface waters that would be polluted by the proposed SWANCC landfill were used as nesting, breeding, and foraging habitat by 121 species of migratory birds.

Migratory birds are the basis of substantial interstate economic activities, including migratory bird hunting (a $1.3 billion dollar annual industry) and migratory bird watching (14.3 million trips annually specifically to observe, feed or photograph waterfowl, many of them across state lines). Congress has formally determined that pollution and

destruction of surface waters and wetlands nationwide threatens the very survival of many migratory bird species, including endangered species, and that the loss of these species would cause profound, long-term economic consequences for our Nation. A rational basis clearly exists for determining that pollution and destruction of waters used by migratory birds would, in the aggregate, substantially affect interstate commerce, and the Clean Water Act permit program is reasonably tailored to address that harm. Where the elected branches of government and expert administrative agencies have so thoroughly considered a matter, this Court should not substitute its judgment for their economic and scientific findings regarding effects on interstate commerce. "The judicial task is at an end once the [C]ourt determines that Congress acted rationally in adopting a particular regulatory scheme." *Hodel*, 452 U.S. at 276.

The Court's decisions in *Lopez* and *Morrison* do not alter this analysis. Those cases expressly did *not* overturn the Court's Commerce Clause jurisprudence of the last sixty years. In enacting the statutes challenged in *Lopez* and *Morrison*, Congress sought to regulate *social* problems, not economic activity. Since the regulated activities were non-economic, the Court determined that the deferential standard of review traditionally applied in Commerce Clause analysis was inappropriate. By contrast, Congress through the Clean Water Act is regulating commerce directly. In this case, the Corps, through the Clean Water Act permit process, restricted and conditioned the pollution of surface waters proposed as part of the development and operation of a solid waste landfill, an obviously "economic endeavor." *Morrison*, 120 S. Ct. at 1750.

Even if *Lopez* and *Morrison* applied, Clean Water Act regulation of intrastate waters clearly meets the standards of those cases. Water pollution regulation is not an area of traditional local control. The federal government has regulated water pollution since 1899, and has exercised comprehensive regulatory power over pollution of waters of

the United States for nearly thirty years. Nor did the Corps in this case impermissibly act as a zoning authority or land use planner. The Corps reviewed and denied SWANCC's permit application because of the substantial *environmental* harms threatened by the proposed landfill, and did not otherwise attempt to exercise traditional land use functions. It is irrelevant that federal environmental regulation may preempt exercises of state police power, including land use power. *Hodel*, 452 U.S. at 291-92.

Finally, the Corps' application of the migratory bird jurisdictional nexus test over the last fifteen years has not resulted in limitless federal regulation. Many federal statutes intensively regulate activities at the local level, including the Fair Labor Standards Act, Occupational Safety and Health Act, the Clean Air Act, the Americans With Disabilities Act, the Resource Conservation and Recovery Act, the Superfund law, the Clean Water Act, and dozens of other federal programs. For Commerce Clause purposes, however, these regulatory programs are not "limitless" — they are constrained to that which is appropriately national by the terms of the regulations themselves. Here, the Corps' regulation is limited to pollution of waters that are used as habitat by migratory birds.

SWANCC in effect asks the Court to determine, under the guise of Commerce Clause analysis, that federal authority here is inappropriate as a matter of policy, and that power to regulate pollution of isolated water bodies should be returned to the states. Aside from being wrong under settled Commerce Clause jurisprudence, SWANCC's approach would fundamentally restructure the balance of power at the federal level as well, establishing the courts as the substantive decision-makers with regard to numerous technical and economic analyses conducted to determine federal jurisdiction under many different statutes. Since 1937, the Court has consistently declined to assume that role, and it should not do so in this case.

The Court instead should affirm that federal statutes having a primary effect of regulating commerce, including the Clean Water Act, are authorized under the Commerce Clause where there is a rational basis for determining that the regulated activities, taken in the aggregate, may substantially affect interstate commerce. In this case, there is a rational basis for the conclusion that pollution of intrastate surface waters used as habitat by migratory birds, taken in the aggregate, would substantially affect interstate commerce. The Corps was fully authorized to regulate water pollution that would result from construction and operation of the SWANCC solid waste landfill. Accordingly, the Court should affirm the judgment of the Court of Appeals for the Seventh Circuit.

ARGUMENT

I. THE CLEAN WATER ACT REGULATES POLLUTION OF ISOLATED, INTRASTATE WATERS TO THE MAXIMUM EXTENT OF CONGRESS'S COMMERCE CLAUSE POWER

A. The Clean Water Act Regulates Pollution of All "Waters of the United States," Regardless of Navigability

1. Congress enacted the Clean Water Act in 1972, establishing a comprehensive federal program "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Prior to 1970, responsibility for regulation of water pollution had largely been left to state and local authorities. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 11 (1981). By 1972, however, water pollution had become a national crisis; the state-led system proved to be "ineffective," *id.*, and "inadequate in every vital aspect." S. Rep. No. 92- 414, at 7, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3674 (cited in *City of Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981)).

Congress determined that a comprehensive federal water pollution regulatory program was necessary for several reasons. First, water pollution — of any substantial body of water — is a problem that inherently crosses state boundaries. "Water moves in hydrologic cycles [of evaporation and precipitation] and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414, at 77, *reprinted in* 1972 U.S.C.C.A.N. at 3742. Pollution or destruction of water resources in one state may cause adverse environmental consequences far beyond that state's borders. *See Middlesex County*, 453 U.S. at 11 (1981).

Second, virtually all significant direct discharges of pollutants result from economic activities, such as industrial production, land development, agriculture, and solid waste disposal. The harm caused to water resources by those activities represents an economic externality of economic activities — a cost of goods or services that may not be borne by the seller or passed along to the consumer. States and localities seek to attract economic investment, to build local tax bases, and to provide services to residents at the lowest possible cost. They have strong disincentives to enforce programs that shift substantial external costs back to the businesses and municipal entities that create them. Congress therefore determined that minimum federal standards were necessary to avoid a continued "race to the bottom" of states relaxing environmental requirements (or refusing to enforce them) in order to attract business. *See* S. Rep. No. 92-414, at 5, *reprinted in* 1972 U.S.C.C.A.N. at 3671-72 (noting lax state enforcement of pre-1970 water pollution control programs).

The Act prohibits "the discharge of any pollutant by any person," into any "waters of the United States" unless authorized by a permit. 33 U.S.C. §§ 1311(a), 1362(7). Congress divided federal responsibilities for implementing and enforcing the Clean Water Act permit program between EPA and the Corps. Under Section 404 of the Act, the Corps

administers permits "for the discharge of dredged or fill material" at specified disposal sites. 33 U.S.C. § 1344.

2. The Clean Water Act regulates pollution of "navigable waters," which are defined in the Act as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The Seventh Circuit and all six of the other courts of appeals that have squarely addressed the question have held that the phrase "waters of the United States" "reaches as many waters as the Commerce Clause allows."[3] Similarly, this Court has noted that the term "navigable" as used in the Act has "limited import," *Riverside Bayview*, 474 U.S. at 133, and that "the Act applies to virtually all surface water in the country," *International Paper Co. v. Ouellette*, 479 U.S. 481, 486 (1987).

SWANCC's attempt to limit federal protection under the Clean Water Act to "navigable" and immediately adjacent waters directly conflicts with these rulings and with the purpose of the Act: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act expressly seeks to protect water quality to "provide[] for the protection and propagation of fish, shellfish, and wildlife and provide[] for recreation in and on the water." 33 U.S.C. § 1251(a)(2). The "[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution." *Riverside Bayview*, 474 U.S. at 132-33. By contrast, the Act does not refer to navigation among its purposes nor does it

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[3] *See SWANCC v. Corps*, 191 F.3d 845, 845 (7th Cir. 1999); *United States v. Byrd*, 609 F.2d 1204, 1209 (7th Cir. 1979); *United States v. Pozsgai*, 999 F.2d 719, 731 (3d Cir. 1993); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 914-15 (5th Cir. 1983); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325 (6th Cir. 1974); *Leslie Salt Co. v. United States*, 896 F.2d 354, 357 (9th Cir. 1990); *Quivira Mining Co. v. EPA*, 765 F.2d 126, 129-30 (10th Cir. 1985); *United States v. Eidson*, 108 F.3d 1336, 1341 (11th Cir. 1997).

include any requirement intended to address navigability. The Court should "give effect to congressional purpose so long as the congressional language does not itself bar that result." *Johnson v. United States*, 120 S. Ct. 1795, 1805 n.10 (2000).

3. Even if there were any ambiguity with regard to this point in the original text of the Act, EPA and the Corps have undertaken extensive rulemaking and other administrative proceedings in establishing the broad meaning of "waters of the United States."[4] The Court has held that *Chevron* deference is granted to the Corps' interpretation of the scope of its jurisdiction under the Clean Water Act. *Riverside Bayview*, 474 U.S. at 133. "Accordingly, our review is limited to whether it is reasonable, in light of the language, policies, and legislative history of the Act for the Corps to exercise jurisdiction" in this case. *Id.* at 131.

4. SWANCC argues that because Congress is presumed not to use words that have no operative effect, a "navigability" requirement must be read back into the definition of "waters of the United States." (Pet. Br. at 18.) The use and relationship of these terms is readily explained by the history of federal water pollution regulation. Congress has regulated water pollution since 1899. In the Rivers and Harbors Appropriations Act of 1899 ("RHA"), a predecessor to the Clean Water Act, protecting navigability was a primary statutory purpose. Section 13 of the RHA — known as the Refuse Act — prohibited the discharge of "refuse matter of

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[4] EPA considered the Clean Water Act definitional issues prior to and at greater length than the Corps, and had ultimate administrative authority for determining the reach of the term "waters of the United States." 43 Op. Att'y Gen. No. 15, at 1 (Sept. 5, 1979). SWANCC challenges the history of the Corps' regulation, but fails to note that the Corps relied largely on EPA — the expert agency charged by Congress with primary responsibility to implement much of the Clean Water Act — in promulgating the Corps' regulation.

any kind" into "navigable water of the United States." 33 U.S.C. § 407. Later amendments of the RHA and new federal water legislation in 1940 continued to use the jurisdictional term "navigable waters." The current version of the Clean Water Act was enacted as an amendment to the water pollution statutes in existence in 1972, which had their origin in the 1899 RHA. Rather than replace the term "navigable waters," Congress redefined it to extend to all "waters of the United States." Thus, the term continues to have an "operative effect" as the subject of the expansive definition that Congress put in place in 1972. However, it does not limit or affect the scope of the Act in any way.

B. In Amending the Clean Water Act, Congress Ratified the Settled Judicial and Administrative Interpretation of "Waters of the United States" as Extending to the Maximum Reach of Congress's Commerce Clause Power.

In 1977 and 1987, Congress passed sweeping amendments to the Clean Water Act, but did not alter the established definition of "waters of the United States" as extending to the limits of federal power under the Commerce Clause. By doing so, Congress ratified the existing interpretation. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975).

The definition of "waters of the United States" to include those waters, the use or misuse of which could affect interstate commerce, was first promulgated in 1975. *See* 40 Fed. Reg. 31,320 (1975). In 1977, Congress reexamined the definition of "navigable waters" under the Act. H.R. 3199, introduced by Congressman Roberts, would have redefined "navigable waters" as "all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce." H.R. 3199, 95th Cong. 39 (1977). S. 1952, introduced by Senator Edmund Muskie, rejected the change and left the definition of "navigable waters" intact,

reflecting the committee's intention "to assure continued protection of all the Nation's waters." S. Rep. No. 95-370, at 75, *reprinted in* 1977 U.S.C.C.A.N. 4326, 4400.

A proposal by Senator Bentsen to amend S. 1952 to limit the definition of "navigable waters" to waters "presently used or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce" was also rejected. Senate Debate, Aug. 4, 1977, *reprinted in* 4 *A Legislative History of the Federal Water Pollution Control Act Amendments of 1977*, at 901, 911 (1978) ("Committee Print" compiled for the Committee on Public Works by the Library of Congress). A number of members of Congress noted that jurisdiction under the Act extended to isolated, intrastate waters. *See* 123 Cong. Rec. 26,711 (1977) (statement of Sen. Bentsen) (warning that if the Act were not amended, "[t]he [Section 404] program would still cover all waters of the United States, including small streams, ponds, [and] isolated marshes . . ."); 123 Cong. Rec. 34,852 (1977) (Rep. Abdnor, extension of remarks) (explaining that the Corps was asserting jurisdiction over "all waters — from the smallest to the largest, including isolated wetlands and lakes, intermittent streams, and prairie potholes"). After heated debate in both the Senate and the House, and consideration of the five years of Corps and EPA implementation, Congress made no changes to the definition of "navigable waters." Committee Print at 938; *see* 123 Cong. Rec. 39,209 (1977) (statement of Senator Baker) (the 1977 Amendments "retain[ed] the comprehensive jurisdiction over the Nation's waters exercised in the [Act] to control pollution to the fullest constitutional extent").

Between enactment of the Clean Water Act in 1972 and passage of the 1977 Amendments to the Act, the federal courts were uniform in their interpretation of "waters of the United States" as extending EPA's and the Corps'

jurisdiction to the limits of the Commerce Clause.[5] Congress ratified this well-settled interpretation when it substantially amended the Act in 1977, and again in 1987, without modification of the key definitional term. *See NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951) (when Congress amended National Labor Relations Act without modification, it accepted the existing administrative construction that had been approved by the courts); *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 279 (1977) (where provisions of a statute were repeatedly reenacted in the same form, the Court had "no doubt that Congress has ratified the statutory interpretation" settled in the courts); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975) (where the courts were unanimous in their interpretation of Title VII requirements, and Congress reenacted the statute without altering that interpretation, despite the introduction of a bill designed to do so, "Congress plainly ratified th[at] construction").[6]

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[5] *See, e.g., Ashland Oil*, 504 F.2d at 1328 (6th Cir. 1974) ("Congress, [in the 1972 Act,] intended to exercise its full constitutional powers"); *Leslie Salt Co. v. Froehlke*, 403 F. Supp. 1292, 1296-97 (N.D. Cal. 1974) (following *Holland* and concluding that Congress's exercise of the commerce power [to combat pollution of the nation's waters] is not limited by traditional "navigable waters" definitions"); *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1184-87 (D. Ariz. 1975) (same).

[6] Rather than change the definition of "waters of the United States," Congress took other steps to address concerns about the scope of the Section 404 program. The 1977 Amendments added new exemptions for certain farming, construction, road maintenance, and other activities. 33 U.S.C. § 1344(f). Ratification is particularly indicated where, as here, Congress considered overruling an agency interpretation of a key term and instead enacted other ameliorative provisions. *See Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 707-08 (1995) (Congress focused on the term "harm" in amending the Endangered Species Act and enacted a permit program rather than overrule the Secretary's interpretation); *Riverside Bayview*, 474 U.S. at 137 (Congress debated "waters of the United States" in legislation "specifically designed to supplant" the agency construction and left the agency's interpretation undisturbed).

C. The Court Should Not Alter the Balance of Federal-State Regulatory Authority Established by Congress in the Clean Water Act

Much of SWANCC's Brief is aimed at persuading the Court that current federal environmental policy is inappropriate, because, for example, law review articles say that states have "acted as leaders in environmental regulation," and "adequately protect" local water resources. (Pet. Br. at 29, 30.) SWANCC implies that this case should be used by the Court to restructure the balance of regulatory power established by Congress, shifting power back to the states and localities that SWANCC asserts will do a better job than the Corps and EPA. Under our constitutional system, of course, this is a judgment that is reserved to the people, through their elected representatives.

Moreover, SWANCC is wrong to argue that primary federal authority is no longer necessary. As Professor Oliver Houck has observed:

> The money to be made on coastal, lakeside, riverside, and wetlands development is all but irresistible. State and local governments stand to gain considerable employment and tax revenue as well. The countervailing impacts of any one permit proposal on overall wetlands functions are extremely difficult for any regulator to identify, and are even less persuasive to the permit applicant. The harm from wetland development is cumulative, not individual. . . . [A] state's perspective . . . might differ from that of other states, or the national interest. . . . Nearly every contested federal wetlands permit decision — and they are numerous — is one that, by federal regulation, already received all necessary state approvals. If the interests of receiving states — of downstream and downflight Americans — are going to be represented, those interests will have to be protected by more than an agency of a state. . . .[7]

The spillover effects and the "race to the bottom" that Congress addressed in 1972 continue to threaten water resources and wildlife even in the current federal-state framework. In *United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769, 774-76 (E.D. Va. 1997), for example, EPA was forced to bring a district court action where Virginia, authorized as the lead Clean Water Act permitting agency, had failed to enforce the Act's requirements against a major in-state employer, resulting in thousands of violations and contamination of the Pagan River over a six year period.

In this case, SWANCC describes the review undertaken by Cook County and the Illinois EPA in approving its landfill project. Yet Illinois granted its approval without effectively addressing the substantial harm to habitat resources, local drinking water supplies, and nearby wetlands that the Corps identified — substantial environmental harms that SWANCC did not dispute in the District Court.

As a matter of environmental policy, Illinois and Cook County may value a landfill more than they value the integrity of the water and wildlife resources at issue here. In the absence of federal jurisdiction, many local authorities no doubt would feel similar economic pressures to ignore potential environmental harms — an accurate description of environmental regulation as it existed prior to 1972.

In passing the Clean Water Act, Congress made a different judgment, finding that environmental resources must be protected, for the economic benefit and well being of the Nation as a whole. This case presents *precisely* the type

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[7] Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 Md. L. Rev. 1242, 1252-53 (1995).

of problem that Congress intended to remedy by establishing uniform national water pollution standards and consistent federal administrative and enforcement mechanisms.

II. CONGRESS HAS COMMERCE CLAUSE POWER TO REGULATE CONSTRUCTION AND OPERATION OF A SOLID WASTE LANDFILL THAT WOULD POLLUTE INTRASTATE SURFACE WATERS USED AS HABITAT BY MIGRATORY BIRDS

A. The Commerce Clause Confers Plenary Federal Power Over Economic Activity that Concerns More States than One

Article I, § 8 of the Constitution grants the federal government power to "regulate Commerce . . . among the several States." Since the earliest days of the Republic, the term "commerce" has been broadly construed to encompass "every species of commercial intercourse" that "concerns more States than one." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 193 (1824).

Under this conception, the Court since 1937 has upheld Congressional regulation of a broad variety of economic activities that are themselves conducted locally, including management of a steel plant, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); cultivation of wheat for personal consumption, *Wickard v. Filburn*, 317 U.S. 111 (1942); operation of a small family restaurant, *Katzenbach v. McClung*, 379 U.S. 294 (1964); participation in extortionate credit transactions, *Perez v. United States*, 402 U.S. 146 (1971); and coal mining, *Hodel v. Virginia Surface Mining Reclamation Ass'n*, 452 U.S. 264 (1981).

To exercise effective control over economic matters of genuinely national concern in modern society, Congress has the power to regulate economic activities that have a substantial effect on interstate commerce in the *aggregate*, even if instances of such activities have little or no effect considered in isolation. *See Hodel*, 452 U.S. at 277

(permitting regulation of activity which "'combined with like conduct by others similarly situated, affects commerce among the several States'") (citation omitted); *Wickard*, 317 U.S. at 127-28 (regulating personal growth and consumption of wheat).

The Commerce Clause grants "plenary authority" to Congress over commerce that concerns more states than one. *Hodel*, 452 U.S. at 276. The "sole restraints" on Congress's exercise of Commerce Clause authority are political, arising from "[t]he wisdom and discretion of Congress, their identity with the people, and the influence which constituents possess at elections . . . ." *Gibbons*, 22 U.S. (9 Wheat.) at 197. Where Congress passes a statute that has the primary effect of regulating economic activity, the Court's review is limited to considering whether there is a rational basis for the finding of substantial interstate economic effects, and whether the means employed are reasonably tailored to the objectives of the statute. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964). The Court will uphold regulation under the Commerce Clause unless it "is *clear* that there is no rational basis" for a determination that the regulated activity substantially affects interstate commerce. *FERC v. Mississippi*, 456 U.S. 742, 753-54 (1982) (quoting *Hodel v. Indiana*, 452 U.S. 314, 323-24 (1981) (emphasis added). Congress "normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce." *United States v. Lopez*, 514 U.S. 549, 562 (1995) (*quoted in United States v. Morrison*, 120 S. Ct. 1740, 1750 (2000)). *See also Heart of Atlanta Motel*, 379 U.S. at 252 (while race discrimination legislation carried no formal congressional findings, record evidenced burdens on interstate commerce); *Perez*, 402 U.S. at 156 (particularized findings not necessary for Congress to legislate).

B. The Clean Water Act Regulates Economic Activity

The activities regulated under the Clean Water Act are obviously and overwhelmingly economic in nature. Discharges of pollutants into surface waters are caused primarily by industrial and commercial operations, including manufacturing, construction, resource extraction, land development, agriculture, and waste disposal. *See, e.g.*, 40 C.F.R. Parts 403-610 (EPA effluent guidelines for 73 categories of industrial activities, filling over 1500 pages of the Code of Federal Regulations). Indeed, SWANCC concedes, in arguing that the Corps' action here may not be upheld under the Treaty Power, that "[m]any environmental laws regulate commercial activity. . . . As such, they are clearly permissible under the commerce power." (Pet. Br. at 49.)

Federal cases involving Section 404 permits issued by the Corps illustrate the economic nature of the regulated activities. In *Riverside Bayview*, for example, the respondent was a corporation seeking a permit to fill 80 acres of wetlands to prepare for construction of a housing development. 474 U.S. at 124; *see also Wetlands Action Network v. U.S. Army Corps of Engineers*, ___ F.3d ___, 2000 WL 1175081, at *2 (9th Cir. Aug. 21, 2000) (permit sought by developer of 1,000-acre district, to include residential areas, a marina, hotels, and retail establishments); *United States v. Deaton*, 209 F.3d 331, 333 (4th Cir. 2000) (permit sought for development of residential subdivision).[8]

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[8] SWANCC cites a study of the Corps' regulation under Section 404 which demonstrates that the overwhelming majority of acreage for which Section 404 permits are sought is intended for commercial, industrial, or other economic use. *See* V. Albrecht & B. Goode, Wetland Regulation in the Real World, ex. 3 (1994) (sampling of Section 404 permit applications in 1992) (cited in Pet. Br. at 38).

SWANCC expresses concern that a "homeowner" might be denied a Clean Water Act permit based on application of the migratory birds jurisdictional nexus test. (Pet. Br. at 31.) That is emphatically not this case, but in any event, "[a] complex regulatory program . . . can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test." *Hodel v. Indiana*, 452 U.S. at 329 n.17.

C. This Case Challenges Regulation of Economic Activity

SWANCC asserts that this is "an as-applied, not a facial challenge," (Pet. Br. at 31 n.12), but then challenges as unconstitutional the "regulation of isolated waters" in the abstract, divorced from the underlying conduct of the human and corporate actors. SWANCC repeatedly attacks the hypothetical scope of the Corps' authority, which it describes as "stretch[ing] to virtually every body of water in the country — including seasonally wet areas in homeowners' backyards, used as a feeding or resting place by birds." (*Id.* at 11.)

Of course, "[i]t has long been this Court's considered practice not to decide abstract, hypothetical, or contingent questions, . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied." *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 460-61 (1946) (refusing to rule on constitutionality of labor statute as it hypothetically could be applied). SWANCC's argument in the abstract also largely ignores the regulatory framework of the Act. The Clean Water Act regulates project development *activities* that alter the physical and biological integrity of water, not the receiving

waters themselves. *See PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. 700 (1994).

It is well-settled that the activity of solid waste disposal is "commerce" for purposes of Commerce Clause analysis. *See City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). Indeed, if the SWANCC landfill is built, it will be constitutionally required to accept solid waste from outside the state of Illinois, and therefore will itself be within the stream of interstate commerce. *See id.* at 623.

SWANCC is a municipal corporation that proposed to build and operate a 142-acre, $69 million solid waste landfill. (A.R. 15635.) The landfill would receive hundreds of thousands of tons of waste each year, generating millions of dollars of revenue, and employ hundreds of personnel. (A.R. 15622.) This obviously is an "economic endeavor." *Morrison*, 120 S. Ct. at 1750. Accordingly, the Corps' jurisdictional nexus test should be considered under the Court's traditional rational basis standard of review.

D. There is a Rational Basis for Determining that Water Pollution Harm to Migratory Birds, in the Aggregate, Substantially Affects Interstate Commerce

As this Court noted in *Morrison*, an important issue for Commerce Clause analysis is whether the federal program includes an "express jurisdictional element" or nexus test that establishes that the program is "in pursuance of Congress' regulation of interstate commerce." 120 S. Ct. at 1751. The migratory birds jurisdictional nexus test serves this function, guiding the Corps in determining the scope of Clean Water Act jurisdiction on a case-by-case basis. This is one of several nexus tests established under the regulatory definition of "waters of the United States," which include, *inter alia*:

> All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce, including any such waters [which are or could be]:

(1) used by interstate or foreign travelers for recreational or other purposes; (2) the source of fish or shellfish taken and sold in interstate or foreign commerce; (3) used for industrial purposes by industries in interstate commerce; (4) used as habitat by birds protected by migratory bird treaties; (5) used as habitat by other migratory birds which cross state lines; (6) used as habitat for endangered species; or (7) used to irrigate crops sold in interstate commerce. *See* 33 C.F.R. § 328.3(a)(3); 40 C.F.R. § 230.3(s); 51 Fed. Reg. 41,206, 41,217 (1986).

Pollution or destruction of aquatic habitat in one state reduces the number of birds dependent on that habitat that can be observed or hunted in other states. Congress was concerned about "the systematic destruction of the Nation's wetlands" and noted that these wetlands are "nesting areas for a myriad of species of birds and wildlife." S. Rep. No. 95-370 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4336. Protection of wildlife is an express purpose of the Act. 33 U.S.C. § 1251(a)(2).

The migratory birds jurisdictional nexus test is supported by extensive data regarding impacts on interstate commerce. The U.S. Congress, Office of Technology Assessment issued a report in 1984 finding that in 1980, 5.3 million Americans hunted migratory birds, spending $638 million in the process. OTA, U.S. Congress, *Wetlands: Their Use and Regulation* 52 n.12 (1984). More than 55 million Americans spent almost $10 billion in 1980 to watch and photograph wetlands-dependent birds, many of which are migratory. *Id.* at 7. Approximately 77 million U.S. residents participated in wildlife-related activities in 1996. U.S. Fish & Wildlife Service, *1996 National Survey of Fishing, Hunting & Wildlife Associated Recreation* 22-23, 60 (1997). Expenditures associated with wildlife-related recreational activities — such as travel, lodging, equipment, and books

and magazines — totaled $101 billion in 1996, including $20.6 billion expended on hunting activities and $29.2 billion expended on wildlife-watching activities. *Id.* Out of 17.7 million bird-watchers, 14.3 million people took trips specifically to observe, feed or photograph waterfowl; 9.5 million took trips to view other water-associated birds, such as herons. *Id.* at 45, 90. Migratory bird hunters numbered 3.1 million, who spent $1.3 billion on their activities. *Id.*

Pollution and destruction of isolated waters and wetlands are a principal threat to migratory birds. *See Fund for Animals v. Frizzell*, 530 F.2d 982, 986 (D.C. Cir. 1975); *see also* 1 Secretary of the Interior, *The Impact of Federal Programs on Wetlands: The Lower Mississippi Alluvial Plain and the Prairie Pothole Region* 20 (1988) ("Prairie potholes [isolated surface waters similar to those at the SWANCC site] are among the most important and also the most threatened ecosystems in the United States. They are prime nesting grounds for many species of North American waterfowl . . . . [providing] up to 50 percent of the U.S. production of migratory waterfowl"). Reduced habitat area not only provides fewer foraging and breeding sites, but also concentrates remaining birds in less space, resulting in increased avian disease and mortality. *Id.* at 29.

Congress has confirmed the link between habitat loss and impacts on migratory birds in a number of statutes. *See, e.g.*, North American Wetlands Conservation Act, 16 U.S.C. § 4401(a)(8) (nationwide loss of wetlands has contributed to serious declines in populations of migratory bird species); Water Bank Act, 16 U.S.C. § 1301 (national public policy to preserve wetlands as migratory bird habitat); Emergency Wetlands Resources Act of 1986, 16 U.S.C. § 3901 (wetlands essential for the ultimate survival of migratory birds; enumerating benefits of wetlands to "all citizens of the Nation" and declaring national goal to conserve remaining wetland resources).

Congress, EPA, and the Corps have a rational basis for determining that pollution of intrastate surface waters, taken

in the aggregate, could substantially affect interstate economic activity. The federal courts that have considered the issue have uniformly concluded that use of intrastate waters by migratory birds is sufficiently connected with interstate commerce to permit federal regulation. *Leslie Salt Co. v. United States*, 896 F.2d 354, 360 (9th Cir. 1990); *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1395 (9th Cir. 1995) (use of 12.5 acres of seasonally ponded areas by 55 species of migratory birds sufficient); *Utah v. Marsh*, 740 F.2d 799, 803-04 (10th Cir. 1984) (isolated lake used for recreation, including wildlife observation, with two percent (2%) of visitors from out of state); *United States v. Sargent County Water Resource District*, 876 F. Supp. 1081, 1087 (D.N.D. 1992) (use of isolated sloughs by migratory birds and potentially by interstate travelers supports jurisdiction).

SWANCC argues that pollution of the ponds on its property will not substantially affect interstate commerce. However, the possibility that SWANCC's landfill might not, by itself, affect interstate commerce is irrelevant. Even activity that is seemingly insignificant may be regulated where its "contribution, taken together with that of many others similarly situated, is far from trivial." *Wickard v. Filburn*, 317 U.S. 111, 128 (1942). "[W]here a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence." *Lopez*, 514 U.S. at 558 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968)). As this Court noted in *Hodel v. Indiana*, water pollution is a quintessential example of the type of national economic problem that Congress is empowered to address at the local level under the Commerce Clause. 452 U.S. at 324. *Accord Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000) (upholding, under *Lopez* and *Morrison*, Endangered Species Act regulation that prohibited taking of reintroduced wolves on private land as necessary part of comprehensive federal program).

E. Even if This Case Challenged Regulation of Non-Economic Activity, Federal Protection of Water Resources and Habitat Meets the Tests of *Lopez* and *Morrison*

1. Congress has well-recognized authority to protect scarce national resources, including wildlife, under the Commerce Clause. Preservation of environmental resources is a traditional and important federal role that has long been upheld by the Court. In *Sporhase v. Nebraska*, for example, the Court noted that ground water was in short supply and needed in many Western states, and that there was therefore "a significant federal interest in conservation as well as in fair allocation of this diminishing resource." 458 U.S. 941, 953-54 (1982). The depletion of ground water was "a national problem" and the Commerce Clause gave Congress "the power to deal with it on that scale." *Id.* at 954; *see also Cochrane v. United States*, 92 F.2d 623, 627 (7th Cir. 1937) (holding that "Congress may lawfully legislate, under the Commerce Clause . . . to protect the game, nongame, and insectivorous birds which migrate").

2. Contrary to SWANCC's argument, this case does not obliterate the distinction between what is national and what is local. SWANCC argues that the Corps acted as a "sort of super zoning board or land use authority," impermissibly encroaching on the traditional jurisdiction of state and local agencies. (Pet. Br. at 28-29.) But the Corps only enforced the requirement of the Act that SWANCC obtain and comply with a permit before discharging pollutants into surface waters. The Corps denied SWANCC's permit application because it would (a) seriously degrade or eliminate habitat used by numerous species of birds and other wildlife; and (b) threaten nearby drinking water supplies and wetlands.

Potential destruction of wildlife habitat, water pollution, and groundwater contamination are not the principal subjects of zoning and land use law. Rather, zoning and land use laws provide for a "uniform plan or design" of community

development, establishing certain siting and building characteristics, such as size (*e.g.*, area in square feet, number of stories), use (residential, commercial, industrial), utility hook ups, signage, building code and safety requirements, and road and transportation access. *See* Peter W. Salsich, Jr. & Timothy J. Tryniecki, *Land Use Regulation* at 136-37 (ABA 1998) (definition of zoning). "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 586 (1987).

Many federal programs limit local police powers to some degree. *See, e.g.*, Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* (regulating land use that affects endangered species); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 *et seq.* (hazardous substance site cleanup); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1276(a) (reclamation of former strip mines); Resource Conservation and Recovery Act, 42 U.S.C. § 6976 (solid waste disposal); Clean Air Act, 42 U.S.C. § 7607(b) (controlling use of property that affects air quality). However, incidental impacts on local authority are irrelevant. "This Court has upheld as constitutional any number of federal statutes enacted under the commerce power that preempt particular exercises of state police power." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 292 (1981) (multiple citations omitted) (rejecting argument that surface mining regulations impermissibly interfered with State police powers by regulating land use).

Moreover, protection of migratory birds has never been viewed as an area of predominantly local concern. Since the early part of this century, the federal government has been active in the protection and preservation of migratory birds through enactment of a series of international migratory bird

treaties. *See Missouri v. Holland*, 252 U.S. 416, 435 (1920) (finding that protection of migratory birds constitutes "a national interest of very nearly the first magnitude" as to which "[i]t is not sufficient to rely on the States").

3. Clean Water Act regulation of pollution of intrastate surface waters used as habitat by migratory birds is not limitless. SWANCC argues that the migratory bird jurisdictional nexus test is unconstitutional under *Morrison* because it would result in "limitless federal regulation." As discussed above, the scope of federal jurisdiction under the Clean Water Act *is* extremely broad, extending to "virtually all surface water in the country." *International Paper Co. v. Ouellette*, 479 U.S. 481, 486 (1987). This broad jurisdiction is necessary to achieve the purposes of the Act — to restore and maintain the chemical, physical, and biological integrity of our Nation's waters. However, this does not mean that regulation under the Act is limitless; it is not.

The Clean Water Act extends to discharges by small family farms; wastewater treatment system operations by towns and villages; shopping mall parking lots upon which rain water flows; dirty bath water running through municipal sewer systems; cooling water discharged by utilities; and filling of wetlands in land development. But this is not the same as unlimited federal regulation of all things everywhere. For example, rain water runoff from parking lots is subject to Clean Water Act *jurisdiction*, but this does not mean that EPA *regulates* all people parking all cars everywhere. Regulated commercial parking lot operations are authorized by a "general permit" issued by EPA, which requires minimal storm water management activities as a means of complying with the applicable federal requirements. *See* 40 C.F.R. § 122.26. Similarly, filling of virtually all wetlands is subject to Clean Water Act jurisdiction, but Congress and the Corps have developed an elaborate system of exceptions and exemptions that have allowed a great deal of wetlands destruction over the last fifteen years, without significant federal regulatory

constraints.[9] *See* 33 U.S.C. § 1344(f) (exemptions from permit requirements).

The Clean Water Act is not unique in providing broad federal jurisdiction where necessary to address a national problem. The Clean Air Act extends to all emissions of hazardous pollutants, whether or not they individually have interstate effects. The Superfund statute governs cleanup at many contaminated hazardous waste sites that have no physical connection whatsoever with other states. The Safe Drinking Water Act applies to isolated intrastate groundwater aquifers as well as to those that cross state lines. The Endangered Species Act prohibits killing of endangered species, even in the privacy of a person's back yard. The Fair Labor Standards Act, Occupational Safety and Health Act, and National Labor Relations Act extend jurisdiction over the vast majority of workers in the United States, but this does not mean that they regulate all workplace activities everywhere. These statutes govern activities that are largely local in nature, which contribute collectively to nationwide problems. But the scope of regulation under these programs is limited by the terms of the regulations themselves. Provided that they are appropriately tailored to meet the harm addressed, the Court will not invalidate such regulations on Commerce Clause grounds. *Hodel*, 452 U.S. at 292. If this Court were to rule in SWANCC's favor, hundreds of similar challenges would be brought seeking strict scrutiny judicial review of interstate commerce connections under these and

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[9] SWANCC paints a picture of the Corps as an overzealous federal regulator running rampant on the rights of innocent developers. Yet of the average of 74,500 Section 404 permit requests received by the Corps each year from 1996 to 1999, only three tenths of one percent (0.3%) were denied. *See* Testimony of Michael Davis, Deputy Assistant Secretary of the Army for Civil Works, before Senate Environment and Public Works Committee, Subcommittee on Air Quality, Wetlands, Private Property, and Nuclear Safety, March 28, 2000.

many other federal environmental, health, and safety programs that regulate economic activities.

Here, the Corps does not interpret the scope of migratory bird jurisdiction to the extremes that SWANCC presents, and it did not apply the test in such a way in this case. As the Seventh Circuit recognized, the Corps' migratory bird test protects waters or wetlands not on the basis of a fleeting migratory bird *presence*, but only where such waters or wetlands are "suitable" for providing actual migratory bird *habitat*. *See SWANCC v. Corps*, 191 F.3d 845, 850 (7th Cir. 1999).

Finally, unlike the programs challenged in *Lopez* and *Morrison*, the Court need not speculate regarding the potential scope of federal regulation in this case. The Corps has applied the current version of the Section 404 program, including the migratory bird jurisdictional nexus test, for more than fifteen years. SWANCC offers no evidence that the Corps has attempted to implement "plenary federal authority over land use." Given the limitations established in the program itself, and the political constraints that would prevent such scenarios, it is clear that the Clean Water Act has not threatened, and will not threaten, the "distinction between what is truly national and what is truly local." *Morrison*, 120 S. Ct. at 1754. The Act will continue to be applied to meet the Congressional purpose of restoring and maintaining the integrity of our Nation's waters, and State and local governments will continue to have primary land use and zoning authority, as they would have in this case, but for the substantial *environmental* threats posed by the SWANCC landfill.

CONCLUSION

The Court should affirm the decision of the Court of Appeals for the Seventh Circuit.

Respectfully Submitted,

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